United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1280

To be argued by
ELIA WEINBACH

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1280

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSE GABRIEL VELEZ-DIAZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Jose Gabriel Velez-Diaz appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, Ch. J.), entered June 10, 1976, convicting him, after a jury trial, on one count of knowingly and intentionally distributing 34.39 grams (net weight) of cocaine hydrochloride, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1). Judge Mishler sentenced appellant to three years imprisonment and imposed a special parole term of ten years during which time appellant was directed not to return to the United States in the event he were deported.

Appellant contends on appeal that the delay between the sale of cocaine (August 7, 1973) and the indictment (February 27, 1975) was prejudicial, and that Judge Mishler's missing witness charge was improper.

Statement of Facts

A. The Government's Case

On August 7, 1973, New York City Police Officer John Heckmann, a member of the New York Drug Enforcement Administration Task Force, arranged through James Thomas, a confidential informant, to purchase cocaine from appellant Jose Gabriel Velez-Diaz (T. 219).[1] At the time, Heckmann had never met Velez-Diaz, but had learned of his identity prior to August 7, 1973, from Thomas, with whom he had worked for two or three months. (T. 220). Thomas described Velez-Diaz to Heckmann and told him that he lived at 419 Franklin Avenue in Brooklyn. (T. 227-229, 270).

In the early afternoon of August 7th, Heckmann directed two officers, one of whom spoke Spanish, to 419 Franklin Avenue. (T. 274, 276). The officers later reported to Heckmann that they went to the address and met Velez-Diaz. (T. 276). Later in the afternoon, Heckmann met with Thomas and told him to meet with Velez-Diaz and arrange the purchase of one ounce of cocaine. (T. 194). Thomas left Heckmann, subsequently returned, and both went to the Task Force office where at about 4:00 P.M. they met with Detective Horace Balmer, another member of the Task Force. (T. 62, 192, 196).

The officers planned to have Thomas introduce Detective Balmer, who would be acting in an undercover capacity, to Velez-Diaz, for the purpose of purchasing cocaine. (T. 61). Before 5:00 P.M. Balmer and Thomas left together in one car and proceeded to 419 Franklin Avenue

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[1] Page numbers in parenthesis preceded by "T" refer to transcript pages of the trial.

in Brooklyn. They were followed in another car by Heckmann and other surveillance officers who remained at all times in their car. (T. 63, 196, 197).

Balmer and Thomas entered appellant's apartment at 419 Franklin Avenue and Thomas introduced Balmer to Velez-Diaz. (T. 65). Balmer, Thomas and Velez-Diaz walked through the living room into the kitchen. The living room ceiling was being painted by a black man wearing painter's garb. Neither Thomas or Balmer spoke to the painter, who remained in the living room. (T. 66, 67). While Balmer was in the kitchen he was unable to see the painter. (T. 67).[2]

In the kitchen, Balmer spoke briefly in English to Velez-Diaz. (T. 65). He asked him how much the cocaine would cost. Velez-Diaz told him Six Hundred Dollars ($600.00). Balmer accepted the price and Velez-Diaz removed a plastic bag from a kitchen cabinet, and spooned cocaine from the bag into two plastic bags. (T. 107). Velez-Diaz gave Balmer the cocaine and Balmer gave him Six Hundred Dollars ($600.00) of authorized funds. (T. 65, 108).[3] After giving Velez-Diaz the money, Balmer asked for ten dollars, which was purportedly for the purchase of gas. Velez-Diaz handed him ten dollars and Balmer and Thomas left the apartment and returned to Balmer's car. They had been with Velez-Diaz for approximately three to five minutes. (T. 68).

Balmer and Thomas drove to a location in Brooklyn followed by the surveillance officers. (T. 69). The officers

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[2] When Velez-Diaz testified regarding the two men who had visited him on August 7th, *supra*, p. 4, he stated that he could see the painter from the kitchen. (T. 298).

[3] Authorized funds were pre-registered Government funds given to Balmer (T. 158).

met and field tested Balmer's purchase which proved positive for cocaine. (T. 69). Subsequently, a Drug Enforcement Administration chemist testified that the substance was cocaine hydrochloride. (T. 34).

B. The Defense Case

The defendant testified in his behalf and denied that he sold cocaine on August 7, 1973, to Detective Balmer or to anyone else. (T. 284). Professing to speak no English,[4] Velez-Diaz stated that he had lived in the United States since December 1972 and had been working as a painter.[5] (T. 288).

Velez-Diaz admitted living at 419 Franklin Avenue on August 7, 1973 and through December, 1973. (T. 289). On August 7th he was painting his apartment with a friend, a black man, named Jose Balsamo. (T. 285). Two people visited his apartment on that day and told him that they worked for the Postal Service. One of the men spoke Spanish. (T. 287). The men said they had two

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[4] A Spanish-speaking translator interpreted throughout. The defendant stated that he had never taken any instruction in English; that he never spoke to anyone in English; that he did not understand English; but that his common-law wife spoke English. (T. 289).

During cross-examination, Velez-Diaz admitted owning two cars during 1973, both of which he had registered. When shown the registration forms, which are in English, he acknowledged his signature but denied knowing who filled out the rest of the application and stated he could not recognize any handwriting other than his own. (T. 301, 302).

[5] After his arrest, the defendant was processed and stated that he was a crewman on a ship, although, at trial, he denied saying he was a crewmember. (H. 342, 343). However, appellant further denied on cross-examination that he had been asked questions after his arrest regarding his height, weight, social security, and passport numbers. (T. 344, 345).

letters, one of which was addressed to Velez-Diaz. The men came into his apartment, walked into the kitchen, asked him a number of questions, and left after leaving the letters with him. (T. 286, 287). Velez-Diaz claimed that he had no other visitors that day. (T. 287).

C. Hearing on Pre-Indictment Delay

The sale of cocaine occurred on August 7, 1973 and the indictment was returned on February 27, 1975. During the trial, Judge Mishler held a hearing out of the jury's presence to determine whether appellant had suffered actual prejudice because of the loss of Balsamo, the black painter, and whether the pre-indictment delay was justified. (T. 171-172, 179, 182, 279, 316-317). Detective Balmer, Officer Heckmann, and appellant testified at the hearing.

Prior to trial, Judge Mishler rejected appellant's claim of prejudicial pre-indictment delay, which was based on two grounds: the loss of appellant's memory and the loss of potential witnesses.[6] Judge Mishler held that appellant had failed to show either actual prejudice or that the government used the delay to gain tactical advantage.[7]

At trial, appellant testified in his own behalf and thus the only prejudice alleged was the absence of a potential witness, Balsamo, the painter, who was present in the apartment, but not in the kitchen where the sale of cocaine occurred. (T. 67). Appellant represented that he had searched for Mr. Balsamo one Sunday in Queens

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[6] Appellant's pre-trial motion is "A" of the Government Appendix.

[7] Judge Mishler's *Memorandum of Decision and Order*, August 11, 1975 is "B" of the Government Appendix.

but could not find him.[8] At the same time, appellant chose not to call another potential witness, James Thomas, the informant. Thomas was a witness to the transaction, had spoken to appellant, was produced for the first trial[9] and was available at all times to appellant. (T. 6, 302, 305, 390). Consequently, at the hearing, Judge Mishler found that the possible loss of Balsamo's testimony was immaterial and that appellant suffered no actual prejudice:

> At this time I find that other testimony was available to sustain the defense and it was rejected. I find that the testimony of Mr. Bassom [sic] is of questionable value, or he could possibly testify to us that he did not see the detective and the informant came into the apartment. He was not in a position to see or hear or understand any part of the transaction. As far as the transaction is concerned it could have been in another part of the city.
>
> So I say that the testimony was not material. (T. 317)

Furthermore, the evidence adduced at the hearing regarding the delay showed that numerous efforts were made by Detective Balmer and Officer Heckmann to locate Velez-Diaz in the course of a continuing investigation to purchase more cocaine from him and to identify his suppliers. (T. 322). These efforts led to a number of locations in Brooklyn and Queens where appellant was

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[8] Transcript of January 26, 1976, reproduced as "C" in the Government Appendix. Balsamo, like appellant, was an alien "whose roots and availability were slight." (Appellant's Brief, at 8). No allegation was ever made that the government was in any way responsible for Mr. Balsamo's absence.

[9] The first trial held in January 1976 ended in a mistrial when appellant's counsel became ill. (T. 3, 8-9).

traced, but despite intensive efforts he was not discovered until his arrest by Immigration and Naturalization Service authorities in February 1975.[10]

Neither Detective Balmer nor Officer Heckmann returned to appellant's house on August 7, 1973, to arrest him.[11] The ten dollars which Balmer borrowed from appellant provided him with the opportunity to repay him at a later time and purchase more cocaine. (T. 111). Within two weeks of the August 7th purchase, Balmer returned to appellant's apartment a number of times to make a second purchase. (T. 129). Appellant was not in his apartment and Balmer left without leaving a message. (T. 123, 124). On one occasion Balmer asked a young lady whether Velez-Diaz still lived in the apartment and was told that he had moved. (T. 126).

Officer Heckmann also tried to locate Velez-Diaz after August 7th. He sent Thomas to 419 Franklin Avenue three or four times within a month of August 7th. (T. 241). He went himself but could not locate Velez-Diaz. (H. 321). On November 14th, Heckmann, Balmer and Thomas went to a new location in Brooklyn to see if they could locate Velez-Diaz. Balmer met with a woman named Sylvia who claimed she was purchasing cocaine from Velez-Diaz and could contact him. (H. 172, 173). Balmer told Sylvia that he wanted to purchase two ounces of cocaine. (H. 175).

Sylvia did not succeed in arranging a meeting. She told Balmer that she had spoken with Velez-Diaz, who

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[10] Heckmann testified that after his fruitless efforts to locate appellant in 1973 and early 1974, the investigative focus changed from penetrating appellant's source of supply to simply arresting him. (T. 331).

[11] Balmer would not have arrested appellant in any event because he was acting in an undercover capacity and did not want his true identity to be revealed. (T. 155).

told her that he was going to a Brooklyn pier to retrieve some cocaine (H. 175). Sylvia asked Balmer to call again but when he did, she said she could not contact appellant and there was no way Balmer could get in touch with him. (H. 178).

After the abortive attempt to make a purchase in November, 1973, Officer Heckmann tried to locate appellant on a number of occasions in 1973 and 1974. (H. 323). He was never successful, although he intermittently received information leading him to believe that appellant was still in New York. (T. 336).

In January, 1974, for example, he obtained a license number registered to Velez-Diaz in Queens. (H. 323, 324). He spoke to a postal carrier who told him that Velez-Diaz had moved out without leaving a forwarding address. (H. 327). In March 1974, he obtained records from the Queens apartment house in which Velez-Diaz had lived, and followed two men who left the apartment and drove to Manhattan in order to locate Velez-Diaz. (T. 327). In May, he spoke to the owner of the apartment building who told him that the apartment was unoccupied. (H. 328). In June, he returned to Brooklyn to locate Velez-Diaz because he had learned that a vehicle registered to Velez-Diaz was there. (H. 328, 329). Previously, in May, Heckmann had received copies of traffic summonses issued against the car. In September, he requested from the Parking Violations Bureau copies of summons issued through September. (H. 329). During the same month he learned that Velez-Diaz had been classified as a scofflaw violator. (H. 329). In January 1975, Heckmann learned that Velez-Diaz had purchased a new car which was listed to a Brooklyn address. Heckmann went to the address but was unable to locate appellant. (H. 329).

In February 1975, Heckmann learned that Velez-Diaz had been arrested by the Immigration and Naturalization Service. (H. 339). Subsequent to appellant's arrest, he provided background information to Task Force officers which listed his address at 110 Nostrand Avenue and his occupation as "crewman".[12] (T. 341-342). The address was different from three other addresses in Brooklyn and Queens to which Heckmann had traced appellant during 1973 and 1974.

During the course of the hearing, Judge Mishler found that:

> delay in bringing the action was not, on the record thus far developed, . . . not designed by the Government to in any way prejudice the ability of the defendant to prepare a defense. (T. 317).

ARGUMENT

POINT I

There was no prejudicial pre-indictment delay.

Appellant argues that the delay between the sale of the cocaine (August 7, 1973) and the indictment (February 27, 1975) mandates reversal of his conviction. The alleged prejudice now asserted is the disappearance of Jose Balsamo, the painter present in the apartment, but not in the kitchen where the sale occurred. Appellant also contends that the government failed to show a compelling reason for the pre-indictment delay.

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[12] The personal history report taken from appellant at the time of his arrest is "D" of the Government Appendix.

The claim is without merit. First, appellant raised the issue of prejudice prior to trial and Judge Mishler properly rejected it because he had failed to show that the loss of a potential witness and of his own memory [13] was prejudicial. Moreover, appellant completely failed to show any governmental design to gain tactical advantage or to harass him. Second, Judge Mishler, after conducting a hearing during the course of the trial, concluded that Balsamo's testimony was not material because he was not a witness to the transaction and appellant chose not to call James Thomas, who *was* a witness and was made available. Furthermore, Judge Mishler found that the delay was not designed to impede appellant in preparing a defense. Third, the law is clear that appellant's speculative claim is insufficient to mandate reversal.

A. First, regarding the allegation of actual prejudice, the mere fact that there has been a delay in indicting appellant provides no basis for reversal on due process grounds.[14] Appellant has the burden of estab-

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[13] At trial, appellant no longer claimed prejudice in this regard; indeed, he managed to remember vividly his whereabouts, actions, dress, and visitors on August 7th. (T. 285, 286). *Cf. Ross* v. *United States*, 349 F.2d 210, 213-215 (D.C. Cir. 1965). See, fn. 16, *supra*.

[14] "The primary guarantees against bringing overly stale charges are the applicable statutes of limitations." *United States* v. *Marion*, 404 U.S. 307, 322 (1971). *See, United States* v. *Frank*, 520 F.2d 1287, 1292 (2d Cir. 1975). In the present case the indictment came well within the applicable statute of limitations, 18 U.S.C. § 3282 (five years) and the delay of seventeen months is considerably less than the delays in other cases where the Supreme Court and this Court have rejected similar claims. *United States* v. *Marion*, *supra* (3 years); *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975) (4½ years); *United States* v. *Feinberg*, 383 F.2d 60 (2d Cir. 1967) (4½ years); *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (4 years).

lishing prejudicial pre-indictment delay, *United States* v. *Capaldo*, 402 F.2d 821, 823 (2d Cir. 1968), and to do so he must show actual, not possible, prejudice and a governmental effort designed to harass or gain tactical advantage through the delay. *United States* v. *Marion*, *supra*; *United States* v. *Payden*, 536 F.2d 541 (2d Cir. 1976); *United States* v. *Finkelstein*, *supra*; *United States* v. *Foddrell*, 523 F.2d 86, 87 (2d Cir. 1975).[15] Actual prejudice is not shown simply by alleging that memories dimmed or that evidence was lost. It results only when the reliability of the proceedings become suspect, *United States* v. *Feinberg*, *supra*, 66 (2d Cir. 1967), and the loss of a potential witness is simply not the kind of actual prejudice sufficient to mandate a reversal. *United States* v. *Ianelli*, *supra*; *United States* v. *Foddrell*, *supra*; *United States* v. *Frank*, *supra*, 1292.

Appellant's claim is speculative in the extreme. It assumes that if Balsamo would have been available he would have testified and that he would have said that Detective Balmer was not in the apartment and the sale of cocaine never occurred. It therefore assumes that without his testimony the jury could not render an intelligent, reasonable and fair verdict despite appellant's evident ability to present his own version of the day's

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[15] This Court has not yet had to reach the issue of whether both elements have to be shown because there has never been a showing of actual prejudice in any of the cases cited *supra* or in other cases. *See, e.g. United States* v. *Brown*, 511 F.2d 920, 923 (2d Cir. 1975); *United States* v. *Ianelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Frank*, 520 F.2d 1287 (2d Cir. 1975); *United States* v. *Eucker*, 532 F.2d 249 (2d Cir. 1976); *United States* v. *Brasco*, 516 F.2d 816 (2d Cir. 1974); *United States* v. *Mallah*, 503 F.2d 971 (2d Cir.), *cert. denied*, 420 U.S. 995 (1975).

events in detail.[16] The argument also conveniently ignores appellant's failure to call James Thomas, the informant, who was always available and presumably would have been one additional witness who "could have enlightened the jury as to the events of August 7, 1973." (Appellant's Brief, at 6).

B. Second, regarding the allegation of government misconduct, appellant suggests that the failure of the officers to arrest appellant immediately should result in reversal of his conviction. While ordinarily the government would not have to justify the reasons for the delay where no actual prejudice is proved, *United States* v. *Brown*, *supra*, 922, the government nevertheless did, at a lengthy hearing, fully justify the delay. The evidence adduced at the hearing and the findings of Judge Mishler showed that the delay resulted from a continuing investigation of appellant, designed to locate his cocaine supplier. During the course of the investigation it became apparent that appellant (and Balsamo) were difficult to locate because, as appellant admits, they were aliens "whose roots and availability were slight." (Appellant's Brief, at 8). Appellant left trails at four different locations in Brooklyn and Queens; he was a parking law scofflaw, and, although disputed by him, he was a crewman on a ship at the time of his arrest. Surely it is not extraordinary for police officers involved in penetrating the drug traffic to avoid arresting immediately everyone from whom they buy drugs. Appellant's prescription for immediate arrest in narcotic cases would

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[16] Cf. *Ross* v. *United States*, *supra*, where the defendant who was uneducated and unemployed had little ability to recall the events of the day; the alibi witness had similar difficulty; and the sole prosecution witness testified not from personal recollection but with the aid of an official notebook.

limit, if not altogether stop, penetration of large scale drug conspiracies and the apprehension of substantial drug suppliers.[17] Moreover, this Court has already looked with disfavor upon performing the "inquisitorial function of scrutinizing the internal operations of law enforcement agencies when no possible prejudice to the accused has been shown." *United States* v. *Feinberg*, *supra*, 67.

POINT II

The trial court's missing witness instruction was proper.

Appellant claims that Judge Mishler's missing witness instruction was improper apparently because Judge Mishler informed the jury that appellant waived his right to examine the informant, James Thomas. Thomas did not testify, but appellant spoke to him prior to trial and chose not to have him produced. Regarding the informant's absence, Judge Mishler advised the jury that he was available to appellant as well as to the government. At the same time, Judge Mishler properly cautioned the jury that appellant had no obligation to call Thomas. Furthermore, both in main and in a supplemental charge, he reminded the jury that the burden of proof always remained with the government. (T. 406, 418).[18]

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[17] Detective Balmer testified that the cocaine was scooped from a plastic bag, which indicated that appellant had access to larger quantities of cocaine then he was selling to Balmer. (T. 107).

[18] The text of the main charge is as follows:

Where a party, in this case the Government, has a witness under its control and influence and that witness has information material to the issues in the case, the failure from the government to produce that witness, the jury may infer that had the witness been brought to testify

[Footnote continued on following page]

Appellant did not object to the charge (T. 417) [19] and there must be, therefore, a showing of plain eror to justify reversal of the conviction. *United States* v. *Rosenthal*, 470 F.2d 837, 843-844 (2d Cir.), *cert. denied*, 412 U.S. 909 (1972). Moreover, contrary to appellant's claim, Judge Mishler's charge to the jury on the missing witness was entirely correct. *United States* v. *Brown*, *supra*, 925; *United States* v. *Super*, 492 F.2d 319, 323 (2d Cir. 1974).

The claim by appellant that it was improper for Judge Mishler, after giving the proper missing witness instruction, to advise the jury as well that the informant was available to him is inexplicable in view of the following.

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before you, that the witness would give testimony unfavorable to the Government. You must determine from evidence whether that witness is presently under the control or influence of the Government and whether that witness would give testimony that is material because if it appears in the record that the witness is available to both parties, then no adverse inference may be drawn.

In this case, I am free to say, with the defendant's consent, that the Government had the informer, James Thomas, under subpoena and was ready to bring the informer to court and made available to the defendant, and the defendant waived his right to examine the informer, James Thomas.

Of course, again, you must keep in mind the burden of the Government. It is the Government that must prove the guilt of the defendant beyond a reasonable doubt. You must also keep in mind that the defendant need not produce any evidence. The defendant was not obligated to examine the witness, James Thomas. (T. 405, 406).

[19] Moreover, after the charge, counsel stated:

Mr. Katcher: There is one addition, [to the charge] I think. Your honor started to speak about the burden of proof but your honor failed to instruct the jury that the burden of proof which rests upon the Government never shifts. It remains. *Other than that, I think your honor covered every other aspect.* (T. 418, emphasis added).

First, the government clearly fulfilled its obligation to identify the informant, *Roviaro* v. *United States*, 353 U.S. 53 (1957), and indeed had gone beyond its obligation by producing him at the first trial and the government and court were ready to have him produced at trial.. (T. 187, 188, 302). See, *United States* v. *Ortega*, 471 F.2d 1350, 1358-59 (2d Cir. 1972). Indeed, appellant had spoken to Thomas, but chose not to call him. (T. 6, 302, 303-305, 390). Second, Judge Mishler unequivocally announced his intention to advise the jury that Thomas was available to appellant if appellant *in any way* indicated that Thomas was unavailable.[20] Appellant firmly repre-

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[20] The Court: I won't charge this either. I will just say the Government has to bring in enough evidence to prove the defendant's guilt beyond a reasonable doubt. It's up to them.

Mr. Weinbach: Until Mr. Katcher makes mention.

The Court: Now he didn't say he would. If he does, then I'll charge this. Because, if the testimony is purely accumulative, then it is up to the jury to determine whether he should have been brought in and I'll say, if it is accumulative, it doesn't have anything to do with the case, no inferences may be drawn. If Mr. Katcher indicates *in any way* that the witness James Thomas was not available to him, he couldn't get him, I will correct that.

Mr. Katcher: *I would not say that, your Honor. I would not say that. I would tell the jury frankly that Mr. Thomas was available to both the Government and myself.*

The Court: I don't know if it even should be mentioned. If you want to stipulate you may do that. It is all right with me.

Mr. Katcher: I'm thinking off the top of my head, I haven't digested this.

The Court: The only time I think I should charge the jury on absent witnesses is when a material witness under the control of one of the parties is not produced. I think normally it's improper for a defense counsel to say why the Government has not produced Mr. Thomas. The

[Footnote continued on following page]

sented that he would be frank with the jury on this very point.[21] Third, despite appellant's representations, however, as soon as he mentioned Thomas' name in summation, he intentionally conveyed the distinct impression that the government was at fault for not producing Thomas.[22] See, *United States* v. *Super*, *supra*, 321; *United States* v. *Williams*, 496 F.2d 378, 382 (1st Cir. 1974).

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usual argument is that there are public policy considerations that are offered concealing the identity of an informant. But the identity was revealed here.

What reason is it that they did not produce him. That has nothing to do with the burden of proof except in a very direct sense. But here, Government has removed that argument by producing him. (T. 308, 309, emphasis added).

[21] It was this representation apparently that counsel refers to as "an agreement between counsel and the Court." (Appellant's Brief, at 11).

[22] Mr. Katcher: The only person who supposedly went into the apartment with Balmer is the *illusive* Mr. Thomas, the informer. I do not have to relate to you or challenge your thinking on what an informer is or what he represents and how much you can trust him and how much you can believe in him. He is not called. He is not called and the challenge is going to be made to me that *possibly* I could have called him as a witness. Yes, that is true, but under our law in a criminal case a defendant need not produce any witnesses and his honor will so tell you that. This is the government's witness, basically. They employed him.

Mr. Weinbach: Objection.

Mr. Katcher: They used him. I do not know about employed. They used him. He was a registered informer. He was given a number, as you heard the testimony. He was on the records of the Joint Task Force as an informer. Whether he got paid or not. I do not care one iota but he was their man. He is the man they said supposedly introduced the cop, the detective to my client. *Is he produced to support that story?* This is what the government wants you to believe. (T. 379, 380, emphasis added).

From the context of the statement it appears that the word should read "elusive" and its use by appellant is illustrative of the point.

Thus, when Judge Mishler advised the jury that Thomas was available to appellant, he did so because appellant had directly defied the trial court's warning that any misimpression on the point would be cured.[23] Judge Mishler properly advised the jury that the informant was equally available to both sides and that appellant had waived his right to examine him. At the same time, Judge Mishler correctly reminded the jury that appellant was not obligated to examine Thomas and that the burden of proof always remained with the government. (T. 406, 418).

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[23] Immediately following appellant's summation, the Court expressed its displeasure with the way in which counsel had given the impression that the government was hiding Thomas. (T. 391).

> Mr. Katcher: I told you yesterday I had no intention of calling him; is that correct?
>
> The Court: I want to be able to tell the jury. They do not know that.
>
> Mr. Katcher: You will also have to tell the jury that in light of that, the defendant has no burden to produce any government witness.
>
> The Court: Of course, I will say that, but you gave the impression the Government was hiding him.
>
> Mr. Katcher: I made mention of my witness your Honor, and I saw no necessity of bringing him because he could not add anything.
>
> The Court: At the time you said it, I thought it was terrible; a complete violation of everything you agreed to yesterday. (T. 390, 391).

CONCLUSION

The judgment of conviction should be upheld.

Dated: September 27, 1976

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27th day of September 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Irving Katcher, Esq.
38 Park Row
New York, N. Y. 10038

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

LYDIA FERNANDEZ

Sworn to before me this
27th day of September 19 76

CAROLYN N. JOHNSON
Term Expires March 30, 19 77